IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DALE ROY SLAVEN,	§	
	§	
Petitioner,	§	
	§	
v.	§	No. 4:14-CV-810-A
	§	
LORIE DAVIS, Director,[1]	§	
Texas Department of Criminal	§	
Justice, Correctional	§	
Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION
and
ORDER

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by petitioner, Dale Roy Slaven, a state prisoner confined in the Correctional Institutions Division of the Texas Department of Criminal Justice (TDCJ), against Lorie Davis, director of TDCJ, respondent. After having considered the pleadings, state court records, and relief sought by petitioner, the court has concluded that the petition should be denied.

I. Factual and Procedural History

On August 2, 2010, petitioner pleaded guilty to eight counts of aggravated robbery, six counts of robbery, and one count of

[1]Lorie Davis has replaced William Stephens as director of the Correctional Institutions Division of the Texas Department of Criminal Justice. Therefore, pursuant to Federal Rule of Civil Procedure 25(d), Davis is automatically substituted as the party of record.

forgery in Tarrant County, Texas.[2] All fifteen indictments also included a habitual-offender notice, to which petitioner pleaded true. (RR, Sentencing Hr'g, vol. 1 at 4.) Following preparation of a presentence investigation report (PSI) and a sentencing hearing, the trial court sentenced petitioner to 60 years' confinement for each of the aggravated robbery offenses, 60 years' confinement for each of the robbery offenses, and 20 years' confinement for the forgery offense. (SHR 77,822-19 at 24-25.) Petitioner appealed his convictions and sentences, but the Second Court of Appeals of Texas affirmed the trial court's judgments, and the Texas Court of Criminal Appeals refused his petitions for discretionary review. Petitioner also filed postconviction state habeas applications challenging his convictions and sentences, which were denied by the Texas Court of Criminal Appeals without written order.

II. Issues

Generally, petitioner raises four grounds for relief: (1) he received ineffective assistance of counsel; (2) his guilty pleas were involuntary; (3) the state courts' decision was based on an

[2]Case Nos. 1178932D, 1179729D, 1179773D, 1179775D, 1180003D, 1180828D, 1180832D, 1180835D, 1180839D, 1180830D, 1180831D, 1180843D, 1181417D, 1183392D, and 1183501D. (State Habeas Record (hereinafter SHR) 77,822-19, at 24.)

unreasonable determination of the facts in light of the evidence; and (4) the state courts' decision was contrary to, or involved an unreasonable application of, clearly established law as determined by the Supreme Court. (Pet. 6-7, 11-16.) Petitioner's grounds are multifarious and are addressed below as thoroughly as practicable.

III. Rule 5 Statement

Respondent believes that petitioner has exhausted his state court remedies as to the claims raised and does not believe that the petition is barred by limitations or subject to the successive-petition bar. (Resp't's Answer at 6.) 28 U.S.C. §§ 2244(b), (d) & 2254(b)(1).

IV. Discussion

A. Legal Standard for Granting Habeas Corpus Relief

A § 2254 habeas petition is governed by the heightened standard of review provided for by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254. Under the Act, a writ of habeas corpus should be granted only if a state court arrives at a decision that is contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court or that is based on an unreasonable determination of the facts in light of the record

before the state court. *Harrington v. Richter,* 562 U.S. 86, 100-01 (2011); 28 U.S.C. § 2254(d)(1)-(2). This standard is difficult to meet and "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." *Harrington,* 562 U.S. at 102.

Additionally, the statute requires that federal courts give great deference to a state court's factual findings. *Hill v. Johnson,* 210 F.3d 481, 485 (5th Cir. 2000). Section 2254(e)(1) provides that a determination of a factual issue made by a state court shall be presumed to be correct. The presumption of correctness applies to both express and implied factual findings. *Young v. Dretke,* 356 F.3d 616, 629 (5th Cir. 2004); *Valdez v. Cockrell,* 274 F.3d 941, 948 n.11 (5th Cir. 2001). Absent express findings, a federal court may imply fact findings consistent with the state court's disposition. *Townsend v. Sain,* 372 U.S. 293, 314 (1963); *Pondexter v. Dretke,* 346 F.3d 142, 148 (5th Cir. 2003); *Catalan v. Cockrell,* 315 F.3d 491, 493 n.3 (5th Cir. 2002). It is the petitioner's burden to rebut the presumption of correctness. Typically, when the Texas Court of Criminal Appeals denies relief in a state habeas corpus application without written opinion it is an adjudication on the merits, which is entitled to the presumption. *Singleton v. Johnson,* 178 F.3d 381, 384 (5th Cir. 1999); *Ex parte Torres,* 943 S.W.2d 469, 472 (Tex.

Crim. App. 1997). Under these circumstances, a federal court assumes that the state court applied the proper clearly established federal law to the facts of the case, express or implied, and then determines whether its decision was contrary to or objectively unreasonable application of that law. *See Virgil v. Dretke*, 446 F.3d 598, 604 (5th Cir. 2006); 28 U.S.C.A. § 2254(d)(1).

(1) and (2) Ineffective Assistance of Counsel and Voluntariness of Petitioner's Guilty Pleas

Under his first and second grounds, petitioner claims that he received ineffective assistance of trial counsel and that his pleas were involuntary. (Pet. at 6, 11-12.)

A criminal defendant has a constitutional right to the effective assistance of counsel at trial. U.S. CONST. amend. VI, XIV; *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Strickland v. Washington*, 466 U.S. 668, 688 (1984). To prevail on an ineffective assistance claim in the context of a guilty plea, a defendant must demonstrate that his plea was rendered unknowing or involuntary by showing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's deficient performance, he would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 56-59

(1985); *Smith v. Estelle*, 711 F.2d 677, 682 (5th Cir. 1983); *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984). In assessing the reasonableness of counsel's representation, "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (quoting *Strickland*, 466 U.S. at 690).

Further, by entering a knowing, intelligent and voluntary guilty plea, a defendant waives all nonjurisdictional defects in the proceedings preceding the plea, including all claims of ineffective assistance of counsel that do not attack the voluntariness of the guilty plea. *Smith*, 711 F.2d at 682; *Bradbury v. Wainwright*, 658 F.2d 1083, 1087 (5th Cir. 1981). A guilty plea is knowing, voluntary and intelligent if done with sufficient awareness of the relevant circumstances and likely consequences surrounding the plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). If a challenged guilty plea is knowing, voluntary and intelligent, it will be upheld on federal habeas review. *James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995).

Petitioner's claims of ineffective assistance of trial counsel are construed as follows: Counsel was ineffective by-

(a) failing to investigate and present expert witness

testimony at sentencing regarding his extensive history of "mental health and medical issues," including "chemical dependency/substance abuse issues," that affect his culpability and would have supported a voluntary intoxication defense and significantly reduced his sentences;

(b) giving him "misleading" advice to enter open guilty pleas and turn down the state's 40-year offers in light of the severity of his cases and his criminal history;

(c) failing to visit and confer with him in jail and to respond to his letters;

(d) failing to investigate and disqualify void convictions used to enhance his range of punishment;

(e) coercing him to forgo the state's 40-year plea offers and waive his right to a trial by jury;

(f) failing to correct the factually erroneous PSI and to consult with him regarding the report; and

(g) failing to conduct a basic, preliminary investigation instead of relying on the PSI, the state's discovery file and his and his mother's testimony at sentencing.

(Pet. at 6-7, 11-12.)

During the state habeas proceedings, trial counsel, John Fritz, responded to petitioner's claims via affidavit as follows:

(1) I never advised Mr. Slaven to reject the State's plea offer.

(2) I explained the effect his pleas of true to the enhancement and deadly weapon allegations would have on his potential sentence and any parole eligibility. I made no representations regarding

> whether or when he would actually be granted parole.
>
> (3) I spoke with Mr. Slaven on several occasions prior to trial, and I discussed the circumstances of his cases, the State's offers and general position with regard to his cases, and his rights, protections, and options concerning his cases.
>
> (4) Mr. Slaven expressed to me that he understood his pleas and that he was entering them freely and voluntarily, sentiments he repeated on the record in open court.

(SHR, 77,822-19, at 34-35.)

Under claims (b) and (e), above, and petitioner's second ground, he claims that his guilty pleas were based on the "misleading" advice of counsel to turn down the 40-year plea offers, were coerced by counsel who was aware that he was on "psychotropic" medication that rendered him "docile, compliant and susceptible to coercion," and at the time he entered his pleas he was suffering from "mental health issues and medical issues causing defisient [sic] mental competency." (Pet. at 6, 11.) These claims go to the knowing and voluntary nature of petitioner's guilty pleas and pleas of true to the enhancements. Applying *Brady, supra,* and relevant state law, the state appellate court addressed these claims as follows:

> Appellant . . . asserts that his guilty pleas were involuntary. A guilty plea must be knowingly and voluntarily made or it will be held constitutionally

invalid. A record reflecting that a defendant was properly admonished presents a prima facie showing that the guilty plea was entered knowingly and voluntarily.

Here, Appellant signed written plea admonishments, each of which states that he entered his plea knowingly and voluntarily and that he was aware of the consequences of his guilty plea. Appellant signed judicial confessions in each case. In person and in open court Appellant pleaded guilty to all fifteen charges, and he affirmed that he was pleading guilty because he was guilty. Although the record presents a prima facie showing that Appellant knowingly and voluntarily entered his pleas, Appellant asserts that his pleas were obtained through coercion and intimidation and were therefore involuntary. Appellant's specific complaint is that he was not aware that the State's forty-year offer was available when he entered open pleas of guilty (with no punishment recommendations). At Appellant's plea hearing, however, the trial court specifically advised Appellant that "[t]here are no plea agreements. It is an open plea. The State is not making you any offer on this." Likewise, Appellant's counsel elicited the following testimony from Appellant:

> Q. [Defense Counsel]: And you have already been admonished on a previous occasion that there was a plea bargain offer made in this case that you rejected?
>
> A. [Appellant]: Yes, sir.
>
> Q. And by entering an open plea today, as the Judge said, you have no guarantee that you are going to do any better and there is a possibility that you could do considerably worse?
>
> A. Yes, sir, I understand.
>
> Q. At any point during this process, has—do you feel like there has been any miscommunication between you and I regarding

> this process, your right to a trial, and what would be the prudent way for you [to] proceed?
>
> A. No, I haven't.

Additionally, Appellant raised, and the trial court addressed, this issue at the abatement hearing. The trial court entered the following related findings and conclusions afterward:

> The defendant contends his trial counsel failed to notify the defendant of a plea offer of 40 years that was made by the State at the August 2, 2010, plea hearing. No such plea offer was made by the State on August 2, 2010. Instead, the State's previous plea offer of [a] 40 year sentence[ ] had expired in May of 2010. The plea paperwork used [i]n connection with the defendant's August 2, 2010, plea does have the number "40" scratched out. However, this reflects the parties' decision to "recycle" previously completed (and unused) paperwork. The deletion of the number "40" from the plea paperwork was not intended by the State to reflect a plea offer of 40 years' imprisonment being made available to the defendant on August 2, 2010.

Thus, Appellant's complaint regarding this issue has no arguable merit.

Appellant additionally asserts that his pleas were involuntary because "his mental compet[e]nce to enter the plea[s] [was] questionable." Appellant asserts (and the PSI indicates) that Appellant has previously been diagnosed with mood disorder, schizophrenia, anti-social personality disorder, depressive disorder, and cocaine dependence. Appellant asserts that it is clear from the record that he has a long history of psychiatric issues as well as several instances of severe head trauma.

> A person is incompetent to stand trial if the person does not have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or a rational as well as factual understanding of the proceedings against him. A court must conduct a competency inquiry only if there is a bona fide doubt in the judge's mind as to the defendant's competence. A bona fide doubt may exist if the defendant exhibits truly bizarre behavior or has a recent history of severe mental illness or at least moderate mental retardation.
>
> Here, Appellant and his counsel both answered affirmatively that Appellant was competent to enter his guilty pleas. When the trial court stated its understanding that "there were some MHMR issues involved," Appellant stated that he was on his medication and that he understood all of the circumstances concerning these pleas. Based on his observations and Appellant's and counsel's answers, the trial court found Appellant competent to enter his guilty pleas. At the punishment hearing, Appellant addressed the court and asked for leniency in a four-page colloquy in the reporter's record.
>
> Appellant's mental health diagnoses would implicate his competence at the time of his guilty pleas only if they impacted his present ability to consult with his counsel with a reasonable degree of rational understanding and his rational and factual understanding of the proceedings against him. We find nothing in the record that would raise a bona fide doubt as to Appellant's competence at the time of his guilty pleas.

(Mem. Op. at 7-10 (citations omitted).)

Having reviewed the record in its entirety, the state court's adjudication of the claims comports with Supreme Court precedent and is reasonable given the evidence before the court.

There is no credible evidence that counsel advised petitioner to reject the state's plea offers or that counsel improperly advised petitioner regarding his rights, waivers, and the consequences of his pleas. Nor is there evidence that petitioner was coerced by counsel in some way or that petitioner was incompetent to enter his pleas. Instead, the record reflects that the trial court was aware that petitioner was on medication for some "MHMR issues" at the time of his pleas; that petitioner was "medication compliant" and understood all the circumstances concerning his pleas; that his pleas were made knowingly, freely, and voluntarily; that petitioner was competent to enter his pleas; and that counsel had not suggested, threatened or promised him anything in order to get him to plead guilty. (RR, Plea Hr'g, vol. 1 at 7-8, 12.) Petitioner also executed the written plea admonishments in which he acknowledged that he was mentally competent, that his pleas were knowingly, freely, and voluntarily entered, and that no one had threatened, coerced, forced, persuaded or promised him anything in exchange for his pleas. (SHR, 77,822-19, at 83-87.) Petitioner's representations during the plea proceedings "carry a strong presumption of verity," and the official records, signed by petitioner, his counsel and the state trial judge are entitled to a presumption of regularity and are accorded great evidentiary

value. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *Webster v. Estelle*, 505 F.2d 926, 929-30 (5th Cir. 1974). The mere fact that petitioner was on medication is insufficient to rebut the presumption that counsel adequately advised petitioner and that petitioner was competent to enter his pleas and did so knowingly, freely and voluntarily with the understanding of the consequences. Without substantiation in the record, a court cannot consider a habeas petitioner's mere assertions on a critical issue in his pro se petition to be of probative evidentiary value. *Ross v. Estelle*, 694 F.2d 1008, 1011-12 (5th Cir. 1983). Petitinoer's self-serving assertions, after the fact, are in and of themselves insufficient. *See Siao-Pao v. Keane*, 878 F. Supp. 468, 472 (S.D.N.Y. 1995). *See also, e.g., Panuccio v. Kelly*, 927 F.2d 106, 109 (2d Cir. 1991) (a defendant's testimony after the fact suffers from obvious credibility problems).

Counsel's obligation is to inform a criminal defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo. *Libretti v. United States*, 516 U.S. 29, 50-51 (1995). Often a criminal defendant, even if he is unwilling or unable to admit his guilt, will agree to plead guilty to an offense, having been so informed by counsel, in order to avoid a

potentially longer sentence by a jury. Such a decision on the part of a defendant does not render counsel's representation deficient or a plea involuntary. *See North Carolina v. Alford,* 400 U.S. 25, 37 (1970); *Brady v. United States,* 397 U.S. 742, 749-50 (1970).

To the court's knowledge the Supreme Court has not addressed the voluntariness of pleas of true. However, under Fifth Circuit case law, a court considers the "totality of the circumstances" to determine whether a plea of true to an enchantment paragraph was voluntary and intelligent. *Holloway v. Lynaugh,* 838 F.2d 792, 793-94 (5th Cir.), *cert. denied,* 488 U.S. 838 (1988). By pleading true to enhancement paragraphs, a defendant concedes that he in fact has prior convictions that can be used to enhance his sentence on the current conviction. *Id.* at 793. He also waives any complaints about the validity of the prior convictions. *Id.; Johnson v. Puckett,* 930 F.2d 445, 449-50 (5th Cir. 1991); *Zales v. Henderson,* 433 F.2d 20, 24 (5th Cir. 1970).

Therefore, by entering pleas of true to the enhancement paragraph in each indictment, petitioner waived his right to challenge the validity of the prior convictions alleged therein if his pleas were voluntary and intelligent. Counsel avers in his affidavit that he explained the effect of petitioner's pleas of

true to the enhancement and deadly weapon allegations would have on his potential sentences and any parole eligibility. (7th Supp. SHR, 77,822-19 at 34-35.) The record also reflects that the trial court explained the effect of a plea of true to the habitual-offender paragraph in the indictments during the plea hearing. (RR, Plea Hr'g, vol. 1 at 5, 9.) Based on the totality of the circumstances, petitioner's pleas of true to the enhancement were intelligent and voluntary.

Therefore, given petitioner's voluntary and knowing guilty pleas and pleas of true, his ineffective-assistance claims (c) and (d) are waived.

Under claims (a) and (g), petitioner asserts counsel was ineffective by failing to investigate and present expert witness testimony to support a voluntary intoxication defense during the sentencing hearing. (Pet. at 11-12.) Specifically, he asserts that he

> requested that counsel develope [sic] his MHMR/mental health history of head trauma and his extreme chemical dependency/substance abuse issues and present them towards volutary [sic] intoxication as a defence [sic]/mitigation of punishment.

(*Id.* at 11.)

Under state law, voluntary intoxication does not constitute a "defense to the commission of crime." *See* TEX. PENAL CODE ANN. §

8.04(a) (West 2011). However, temporary insanity caused by intoxication may be presented by a defendant in mitigation of punishment. *Id.* § 8.04(b). Although the record in this case is silent as to the nature and extent of counsel's investigation into these matters, the PSI apparently provided details of petitioner's mental health issues and lengthy history of substance abuse.[3] Further, petitinoer was permitted to give a "freeform" statement at the sentencing hearing during which he discussed these matters. Petitioner presents no evidence indicating that additional investigation by counsel would have yielded evidence that would have resulted in significantly lower sentences. To prevail on a failure-to-investigate claim, a petitioner must allege with specificity what a more thorough investigation would have revealed and how it would have benefitted him. *United States v. Green,* 882 F.2d 999, 1003 (5th Cir. 1989). Petitioner presents nothing to indicate that the outcome of his trial would have been different had additional evidence of his mental health and substance abuse been introduced. Moreover, "complaints of uncalled witnesses are not favored in federal habeas corpus review because allegations of

[3]The PSI is not included in the state court records.

what the witness would have testified are largely speculative." *Evans v. Cockrell*, 285 F.3d 370, 377 (5th Cir. 2000). This court will not assume that witnesses, from whom no affidavits are presented, would have testified favorably for the defense. The trial court was aware of petitioner's difficult childhood, "MHMR issues" and substance abuse as stated in the PSI report and testified to by petitioner and his mother and appears to have given petitioner's "life" consideration in determining his sentences. (RR, Sentencing Hr'g, at 56.)

Finally, under (f), petitioner asserts that counsel was ineffective by failing to correct unspecified factual errors in the PSI report. (Pet. at 12.) On direct appeal, petitioner claimed the PSI report inaccurately recited that he was affiliated with the Aryan Brotherhood in prison and that he suffered a head injury in 1990 rather than 2006. The state appellate court, relying solely on state law, addressed the claim as follows:

> Appellant . . . contends that the presentence investigation report was not conducted thoroughly or accurately and led to a significantly higher sentence. Appellant contends that the PSI was inaccurate in reciting that he acknowledged "affiliation" with the Aryan Brotherhood while inside prison. He also contends that the PSI misreported that he sustained a head injury in 1990, when he actually sustained it in 2006, and that the proximity in time of his injury to his

2009 crimes may have had some mitigating influence on his sentencing. Appellant contends that he was not allowed adequate access to the PSI, nor time to consult with his counsel to formulate an objection to the incorrect information. He contends that if he had been given adequate time and assistance of counsel, the trial court would have given him a lesser sentence.

"Unless waived by the defendant, at least 48 hours before sentencing a defendant, the judge shall permit the defendant or his counsel to read the presentence report." "The judge shall allow the defendant or his attorney to comment on a presentence investigation . . . and, with the approval of the judge, introduce testimony or other information alleging a factual inaccuracy in the investigation or report."

At the conclusion of Appellant's guilty pleas, the trial court stated, "We are going to have the presentence investigation report prepared as expediently as possible. After I receive a copy of it, I'll have your lawyer to have a copy of it and the State have a copy of it and I'll bring you back so he can review it with you and I'll hear any punishment evidence that he wishes to present." At the punishment hearing, the State asked the trial court to admit a copy of the PSI into the record for all purposes, Appellant's counsel stated that he had no objection, and the trial court entered the exhibit. Appellant contends that his counsel "may have had adequate time to review" the PSI, but that he (Appellant) "was not given this opportunity" and that "the short amount of time he was allowed," he was without counsel. We note that Appellant's complaint that he did not have sufficient time to review the PSI is forfeited because it was not made to the trial court by a timely objection. Even disregarding forfeiture, however, this complaint lacks arguable merit.

Regarding Appellant's complaint that the trial court's sentencing was based on inaccurate information in his PSI, the defendant bears the burden to point out any material inaccuracy in the PSI to the trial court

at the time of the sentencing hearing. The appellant bears the burden on appeal of showing that the trial court relied on inaccurate information in determining his sentence. Although Appellant's counsel did not object on the record to inaccuracies in the PSI (and in fact stated he had no objection to it being introduced as an exhibit), Appellant asserts that he preserved error on this issue by telling the trial court at the sentencing hearing that, "I have hung out, yes, with Aryan Brotherhood. I have never joined. I've hung out with them because in prison, when you're a 17- or 18-year-old kid out of the suburbs on a prison unit like B21 in the '80s, you ain't got no choice. I signed. I'm not say[ing] that's an excuse for what I did when I got out. Okay. But I did what I had to survive in there." Appellant also stated, "I'm not a racist. I don't want that to figure in your decision." Contrary to Appellant's argument, his testimony establishes the accuracy of the PSI; that is, that he affiliated with the Aryan Brotherhood while in prison. In any event, the record demonstrates that Appellant was not harmed by any alleged inaccuracies about his affiliation with the Aryan Brotherhood while in prison. Indeed, the trial court stated to Appellant at the sentencing hearing, "[Y]ou brought up the fact that while you were in the penitentiary, you associated yourself with the Aryan Brotherhood and you didn't want me to take that into consideration, and I don't. All I take into consideration [are] the crime[s]. . . ."

Regarding Appellant's argument that the PSI incorrectly stated that he sustained a head injury in 1990 rather than in 2006, he forfeited this complaint because he failed to alert the trial court to the alleged inaccuracy. Even disregarding forfeiture, however, there is no indication that the trial court would have given Appellant a lesser sentence if the PSI had stated that Appellant sustained the head injury in 2006. Indeed, the PSI states that there appears to be a direct correlation between his criminal activity and substance abuse. Likewise, in testifying in the punishment phase about his culpability in the 2009 crimes, Appellant did not assert that a 2006 head

> injury mitigated his culpability; instead, he testified, "I have got a drug addiction. . . . And when I was out there doing what I was doing, I was so far strung out and in my drugs." Further, in assessing Appellant's punishment, the trial court emphasized that Appellant's use of drugs while committing his offenses was "frightening" because "[i]f you're on drugs you know what you're doing, but you don't care what you're doing because drugs take over." In fact, the trial court explicitly explained the basis for the sentences imposed: "All I take into consideration is the crime itself, the pain and suffering that it's caused the victims, because the victims are as important as the person who is standing up here to be sentenced. I have to take their lives into consideration just like I take your life into consideration." Thus, the record demonstrates that the alleged inaccuracies did not harm Appellant because the trial court did not consider them.

(Mem. Op. at 10-14 (citations omitted).)

The state court's adjudication of the claims is neither contrary to or an unreasonable application of clearly established Supreme Court precedent nor it is based on an unreasonable determination of the facts in light of the record before the state court. Even if petitioner could show that counsel was deficient for not objecting to the alleged inaccuracies in the PSI, which he has not, he fails to demonstrate that but for this omission a reasonable probability exists that his sentences would have been significantly less harsh given the nature and extent of the underlying offenses and petitioner's extensive criminal

history.[4] *Spriggs v. Collins*, 993 F.2d 85, 88 (5th C ir. 1993). Petitioner is not entitled to relief under grounds one and two.

(3) and (4) State Habeas Court Proceedings

Under his third and fourth grounds, petitioner claims he was denied a full and fair opportunity to develop the facts in the state courts and that the trial court's factual findings, as proposed by the state, are based on an unreasonable determination of the facts in light of the evidence. (Pet. at 7, 13-15.) Specifically, petitioner complains that counsel's affidavit is vague and ambiguous; that the trial court's findings contradict counsel's affidavit and are not otherwise supported by the record; that petitioner was unable through no fault of his own to develop the facts; that the state court "infers all forms of professionalism and sufficient representation from counsel" where there is nothing to support such inferences; and that the finding that petitioner lied in his pleadings is patently false. Clearly, certain inconsistencies in the state habeas court's factual findings and counsel's affidavit exist. However, the Texas Court of Criminal Appeals did not adopt the findings, likely due to

[4]TDCJ's website reflects that prior to the instant offenses, petitioner had eight prior felony convictions in Tarrant County, Texas. TDCJ's Offender Information Details, *available at* http://www.tdcj.state.tx.us/offender_information.

those inconsistencies, in denying petitioner's state habeas applications. As previously noted, under such circumstances, the Texas Court of Criminal Appeals presumably applied correct standards of federal law and made findings consistent with its decision. The Supreme Court has established that a state court's failure to make explicit findings of fact does not affect the deference a court must accord the state court's determination. *See Harrington,* 562 U.S. at 9 ("[D]etermining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." (citations omitted)). See also *Amos v. Thornton,* 646 F.3d 199, 205 (5th Cir. 2011) (per curiam) (finding that deference to the state court is not diminished when the state court "did not explain the reasons for its determination"). This is so even if the state court proceedings may not have been full and fair. *Valdez v. Cockrell,* 274 F.3d 941, 950-51 (5th Cir. 2001) (providing to require "a full and fair hearing requirement that would displace the application of § 2254(e)(1)'s presumption would have the untenable result of rendering" the statute a nullity), *cert. denied,* 537 U.S. 883 (2002). Furthermore, alleged defects in a state habeas proceeding are not cognizable under federal habeas

review. *Rudd v. Johnson*, 256 F.3d 317, 319-20 (5th Cir. 2001); *Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999). Petitinoer is not entitled to relief under his third and fourth grounds.

V. Conclusion

In summary, petitioner has failed to satisfy his burden by showing that the state courts' rejection of his claims involved an unreasonable determination of the facts or an unreasonable application of federal law as determined by the Supreme Court.

For the reasons discussed,

The court ORDERS the petition of petitioner for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be, and is hereby, denied. The court further ORDERS that a certificate of appealability be, and is hereby, denied, as petitioner has not made a substantial showing of the denial of a constitutional right.

SIGNED September 12, 2016.

JOHN MCBRYDE
UNITED STATES DISTRICT JUDGE